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In the

Supreme Court of the United States

October Term, 1959

No. 691

REYNOLDS METALS COMPANY,
a corporation, *Petitioner,*

v.

PAUL MARTIN and VERLA MARTIN,
husband and wife, *Respondents.*

Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

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Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now REYNOLDS METALS COMPANY, a corporation, and respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon, entered in the above-entitled case on November 18, 1959.

OPINIONS BELOW

The opinion of the Circuit Court of the State of Oregon for Multnomah County in granting respondents'

motion for a directed verdict is unreported and is appended hereto at pages 29 to 33.

The opinion of the Supreme Court of the State of Oregon affirming the judgment of the Circuit Court of the State of Oregon for Multnomah County is reported at 68 Or. Adv Sh 1577, 342 P 2d 790, and is appended at pages 34 to 55.

No written opinion was rendered by the Supreme Court of the State of Oregon in denying a petition for rehearing.

JURISDICTION

The judgment of the Supreme Court of the State of Oregon was dated July 29, 1959, and was entered on the same day.

November 18, 1959, an order of said court was filed denying a petition for rehearing. On November 25, 1959, an order of said court was filed staying issuance of the mandate for a period of 90 days to permit petitioner to apply to this court for a writ of certiorari.

This court has jurisdiction to review the judgment in question by writ of certiorari by reason of 28 USCA 1257 (3) because rights claimed under the Constitution of the United States are involved.

QUESTIONS PRESENTED

1. Was petitioner denied equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States by reason of the refusal of the Supreme Court of the State of Oregon, in determining that petitioner had trespassed upon respondents' real property, to apply well-settled common law rules?

2. Was petitioner denied equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States by reason of the refusal of the Supreme Court of the State of Oregon to give petitioner the benefit of the new rule of law applicable to trespass actions which it formulated in this case?

3. Does the decision of the Supreme Court of the State of Oregon interfere with the effective conduct of the national defense program by the federal government and the efficient operation of the basic economy of the nation?

CONSTITUTIONAL PROVISIONS AND STATUTES

1. *Constitution of the United States*, Amendment XIV, § 1

> "No state shall * * * deny to any person within its jurisdiction the equal protection of the laws."

2. *Constitution of the United States*, Article I, § 8

"The Congress shall have Power To * * * provide for the common Defense and general Welfare of the United States; * * *

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *

"To declare War, * * *

To raise and support Armies, * * *

"To provide and maintain a Navy;

"To make Rules for the Government and Regulation of the land and naval Forces;

"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

"To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

3. *1 Oregon Rev. Statutes*, § 12.010, p. 75

"Actions at law shall only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, except where a different limitation is prescribed by statute. The objection that the action was not commenced within the time limited shall only be taken by answer, except as provided in ORS 16.260."

4. *1 Oregon Rev. Statutes*, § 12.080, p. 76

> "Within six years. * * *
>
> "(3) An action for waste or trespass upon real property."

5. *1 Oregon Rev. Statutes*, § 12.110, p. 76

> "Within two years; * * *
>
> " * * * any injury to the person or rights of another, not arising on contract, and not especially enumerated in this chapter, shall be commenced within two years; * * *."

STATEMENT OF THE CASE

Inasmuch as the chief issue presented by this petition relates to the law of trespass and the application thereof, only those facts are stated which are required to place this issue in its setting.

A. Summary of Facts

Petitioner operates an aluminum reduction plant located near Troutdale, Multnomah County, Oregon. In the course of its operation of that plant, fluoride compounds *unavoidably* escape into the atmosphere in the form of gases, fumes and submicron size (invisible) particulates. During the period from August 22, 1951, to January 1, 1956, respondents owned certain lands

located to the east of petitioner's aluminum reduction plant which had been used for the grazing of cattle.

February 17, 1955, respondents commenced this action by filing a complaint in which they alleged that fluoride compounds escaping from petitioner's plant had rendered their lands unfit for raising livestock during the aforementioned period. They further alleged that willows, brush, trees and weeds had grown up on said lands because of lack of use. Respondents sought compensatory damages in the sum of $300,000 for the loss of use of said lands, $150,000 for deterioration in the condition thereof, and $300,000 as punitive damages. Respondents characterized their cause of action as trespass in their complaint, first amended complaint and second amended and supplemental complaint.

The statute of limitations in the State of Oregon is six years in trespass actions. *1 Oregon Rev. Statutes*, § 12.080, p. 76. In nuisance actions, the statute of limitations is two years. *1 Oregon Rev. Statutes*, § 12.110, p. 76.

In the lower court petitioner continually urged that the settling of gases, fumes and particulates upon real property did not constitute a trespass inasmuch as such effluents could not be seen or touched. Motions to strike the characterization of the action as trespass directed at each of the complaints were denied in each instance by the court.

B. The Decision of the Trial Court

At the conclusion of the evidence, both parties moved for a directed verdict. The trial court awarded respondents the sum of $71,500 for loss of use of their said ranch lands and $20,000 for deterioration of said lands. Judgment was entered for respondents in the sum of $91,500.

C. The Decision of the Court Below

Petitioner appealed from this judgment to the Supreme Court of the State of Oregon. Among the errors of law assigned as error on appeal to that court as ground for reversal were the following:

1. The ruling of the trial court that the settling of gases, fumes and particulates upon respondents' real property constituted a trespass.

2. The failure of the trial court to hold that respondents' claims were subject to the two-year statute of limitations.

The Supreme Court of the State of Oregon

(1) Defined a trespass as "any intrusion which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be

measured only by the mathematical language of the physicist."

(2) Stated that the tort of trespass "involves a weighing process, similar to that involved in the law of nuisance, although to a more limited extent than in nuisance and for a different purpose, i.e., in the one case to define the possessor's interest in exclusiye possession, and in the other to define the possessor's interest in use and enjoyment."

(3) Refused to accord to petitioner the benefit of the "weighing process."

(4) Held that the settling of invisible flûoride particulates escaping from petitioner's plant and settling upon respondents' real properties resulted in a trespass.

D. Raising of Federal Questions

Petitioner's prayer for a writ of certiorari in this case is based upon

1. Denial of equal protection of the laws because of the action of the Supreme Court of the State of Oregon outlined above; and

2. The effect of the character of the decision upon the national defense program and the basic economy of the nation.

That the court, in rendering its decision, would ignore well-established rules of common law as to the tort of trespass, formulate a new definition of trespass and fail to apply the new definition in this case was, of course, a matter that petitioner could not be cognizant of until the court's opinion was filed. Also, only at this point could petitioner be aware of the probable effect of the decision upon the national defense program and the basic economy of the nation.

Therefore, the first opportunity which petitioner had to raise the federal questions sought to be reviewed herein was in its petition for rehearing filed with the Oregon Supreme Court and in its brief in support thereof. For this reason, petitioner's assertion of the federal question in its petition for rehearing to the Supreme Court of the State of Oregon and in its brief in support thereof was timely. *Brinkerhoff-Faris Trust Co. v. Hill* (1929) 281 US 673, 677-678; *Great Northern R. Co. v. Sunburst Oil & Ref. Co.* (1932) 287 US 358, 367. The petition for rehearing was summarily denied by the court. The efficacy of said petition and brief as to raising federal questions is not less because it was summarily denied. *Brinkerhoff-Faris Trust Co. v. Hill*, supra; *Missouri ex rel Missouri Ins. Co. v. Gehner* (1929) 281 US 313, 320.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

Petitioner submits that this court should review the decision of the Supreme Court of the State of Oregon for the following reasons:

I

Petitioner was denied equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States by reason of the refusal of the Supreme Court of the State of Oregon, in determining that petitioner had trespassed upon respondents' real property, to apply well-settled common law rules.

II

Petitioner was denied equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States by reason of the failure of the Supreme Court of the State of Oregon to accord petitioner the benefit of the new rule of law applicable to trespass actions which it formulated in this case.

III

The decision of the Supreme Court of the State of Oregon conflicts with the effective conduct of the national defense program by the federal government and

interferes with the efficient operation of the basic economy of the nation.

ARGUMENT

I

Petitioner was denied equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States by reason of the refusal of the Supreme Court of the State of Oregon, in determining that petitioner had trespassed upon respondents' real property, to apply well-settled common law rules.

A. The court did not accord petitioner the benefit of common law principles of the State of Oregon regarding the distinction between the torts of trespass and nuisance.

The statute of limitations in the State of Oregon is six years in trespass actions. *1 Oregon Rev. Statutes*, § 12.080, p. 76. In nuisance actions, the statute of limitations is two years. *1 Oregon Rev. Statutes*, § 12.110, p. 76. In the subject case respondents claimed, and were awarded, damages for a period of four and one-half years. Accordingly, the determination of the applicable statute of limitations was vital to an establishment of the parties' rights. This in turn, of course, required a

determination as to whether or not the alleged wrongful conduct was in the nature of a trespass or a nuisance.[1]

1. Under the common law of the State of Oregon a trespass occurs only when there has been an invasion by an object.

It is the settled rule that to constitute a trespass, an invasion causing interference with possession, there must be occupancy of space by an object. *Restatement of the Law of Torts*, § 158, pp. 359-360; § 165, p. 390; § 166, pp. 394-395. This rule has been accepted in Oregon.

Amphitheaters, Inc. v. Portland Meadows (1948) 184 Or. 336, 198 P 2d 847.

This was an action brought by the operator of a drive-in open air motion picture theater against the operator of an adjoining race track for horses. The track was brilliantly lighted for night racing. It was alleged that the lights from the track destroyed the natural

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1. The court conceded that trespass and nuisance are separate fields of tort liability:

Martin v. Reynolds Metals Company (July 29, 1959), 68 Or. Adv Sh 1577, 1580

"Trespass and private nuisance are separate fields of tort liability relating to actionable interference with the possession of land. They may be distinguished by comparing the interest invaded; an actionable invasion of a possessor's interest in the exclusive possession of land is a trespass; an actionable invasion of a possessor's interest in the use and enjoyment of his land is a nuisance. 4 Restatement, Torts 224, Intro. Note Chapter 40."

darkness on plaintiff's property, rendering it impossible to successfully show outdoor motion pictures, and thus constituted a trespass, or, in the alternative, a nuisance. Judgment based on a directed verdict for defendant was affirmed. The Supreme Court of the State of Oregon states at pages 343-344, 345:

> "Plaintiff contends that the defendant, by casting light equivalent to that of a full moon upon plaintiff's screen has committed a trespass upon real property and error is assigned by reason of the failure of the court to submit to the jury the question of trespass. While the dividing line between trespass and nuisance is not always a sharp one, we think it clear that the case at bar is governed by the law of nuisance and not by the law of trespass. Under our decisions every unauthorized entry upon land of another, although without damage, constitutes actionable trespass. Kesterson v. California-Oregon Power Co., 114 Or. 22, 228 P. 1092; Huber v. Portland Gas & Coke Co., 128 Or. 363, 274 P. 509; 52 Am. Jur., Trespass, § 47, p. 872; Restatement of the Law of Torts, Vol. 1, § 158, p. 359. *The mere suggestion that the casting of light upon the premises of a plaintiff would render a defendant liable without proof of any actual damage, carries its own refutation. Actions for damages on account of smoke, noxious odors and the like have been universally classified as falling within the law of nuisance. In fact, cases of this type are described in the Restatement of the Law as 'non trespassory' invasions.* Restatement of the Law of Torts, Vol. 4, Ch. 40, p. 214, et seq.

"* * * We need not argue the distinction between a cannon ball and a ray of light." (Emphasis added)[2]

The Supreme Court of the State of Oregon never attempted to limit the application of the *Amphitheaters* decision in any way. In the case at bar the court did consider the *Amphitheaters* decision at some length. While not overruling the decision and continuing to recognize it as part of the substantive law of Oregon, the court did not give petitioner the benefit of the rule of law set forth therein. Yet the *Amphitheaters* rule continues to exist as a rule to be applied without restriction to persons involved in litigation similar to that in which petitioner is presently involved. However, petitioner has been denied the benefit of this existent rule and has, therefore, had abridged its federally guaranteed right to have the substantive law of the Supreme Court of the State of Oregon applied without discrimination.

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2. In a recent comment concerning this decision, Dean Page Keeton of the University of Texas Law School stated in 59 Columbia Law Review (1959) at page 468 as follows:

"While it is generally assumed and held that a personal entry by the actor is unnecessary for the latter to be a trespasser, *his act must result in an invasion by tangible matter;* otherwise, there would be no disturbance of possession. Thus, it is not a trespass to project light, noise, or vibrations across or onto the land of another because there is no occupancy of space even for a brief period.

"In *Amphitheatres, Inc. v. Portland Meadows*, the court said:

"While the dividing line between trespass and nuisance is not always a sharp one, we think it clear that the case at bar is governed by the law of nuisance and not by the law of trespass. . . . The mere suggestion that the casting of light upon the premises of a plaintiff would render a defendant liable, without proof of any actual damage, carries its own refutation." (Emphasis added)

2. Under the common law of the State of Oregon a trespass occurs only when the injuries complained of are the direct rather than the consequential result of the alleged wrongful act.

A cause of action in trespass arises only where the injury is direct and immediate rather than consequential. This rule was recognized by the Supreme Court of the State of Oregon 27 years ago and has remained inviolate since its enunciation. In *Norwood v. Eastern Oregon Land Co.* (1932) 139 Or. 25, 5 P2d 1057, 7 P2d 996, the court stated at pages 37-38:

> "The injuries which he sustained were not of the immediate and direct nature which is essential in an action for trespass. The damage to the crops and the lands followed as a consequence of the wrongful diversion of the water, but it can not be said that they were the immediate and direct result of such wrongful act. As stated in 2 Words & Phrases, First Series, p. 1442:
>
> "' "Consequential damages," are those that follow naturally, but indirectly, from a wrong act.'
>
> "Also see 26 R.C.L. 930, wherein it is said:
>
> "' ' * * * an injury is a trespass only when it is immediate and directly occasioned by, and is not merely a consequence resulting from, the act complained of.' "

This rule has never been overruled nor modified. It remains the law of the State of Oregon to this day, as a mandatory rule to be followed in determining whether the conduct of a defendant constitutes a trespass or a nuisance in any case in which that question must be resolved. The court denied to petitioner its constitutional right to have this rule applied here. Although the question was clearly before it, the court declined to give petitioner the benefit of said rule, not by overruling or changing it, but by ignoring its existence for the purpose of this case. The court acknowledged that the damages flowing from the acts of which respondents complained were consequential, but then stated:

Martin v. Reynolds Metals Co. (July 29, 1959) 68 Or. Adv Sh 1577, 1591

> "The distinction between direct and indirect invasions where there has been a physical intrusion upon the plaintiff's land has been abandoned by some courts. * * * it is not necessary for us to decide whether the distinction is recognized in this state."

The court thus declined to give petitioner the benefit of an Oregon common law rule of long standing which is, and will, under the law of the state as it now exists, continue to be available to others to whom the distinction between trespass and nuisance is of importance.

B. Failure to give petitioner the benefit of rules of law which would be accorded to others similarly situated is a denial of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

The equal protection clause of the Fourteenth Amendment to the Constitution of the United States guarantees subjection to equal laws, applying alike to all in the same situation. *Southern R. Co. v. Greene* (1909) 216 US 400. The Supreme Court of the State of Oregon has recognized that under the equal protection clause of the Federal Constitution there is a guarantee of like treatment to all persons similarly situated. *State of Oregon v. Pirkey* (1955) 203 Or. 697, 281 P2d 698. Action of state courts and judicial officers in their official capacities is action of the state within the meaning of the Fourteenth Amendment to the Constitution of the United States. *Shelley v. Kraemer* (1947) 334 US 1.

As already noted, the ultimate question involved in this case is whether the two or the six year statute of limitations is applicable. Consequently a determination as to whether or not petitioner's conduct constituted a trespass or a nuisance is essential. The Supreme Court of the State of Oregon has formulated certain principles to be used in determining whether certain conduct constitutes a trespass or a nuisance. Such principles have

not been abrogated or overruled. They remain for application to litigants other than petitioner. However, the benefit of these principles has been denied to petitioner in this case. This is an unjust discrimination and denial of equal protection of the laws.

For the reasons set forth above, petitioner respectfully urges that a writ of certiorari should issue to correct the violation by the Supreme Court of the State of Oregon of petitioner's fundamental rights under the Fourteenth Amendment to the Constitution of the United States.

II

Petitioner was denied equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States by reason of the failure of the Supreme Court of the State of Oregon to accord petitioner the benefit of the new rule of law applicable to trespass actions which it formulated in this case.

A. The court has injected a "weighing process" into the tort law relating to trespass.

In determining whether certain activity constitutes, or results in the creation of, a nuisance, the courts have traditionally weighed the utility of the conduct complained of against the gravity of the harm occurring.

Until the decision in the present case, this weighing process has been entirely foreign to the law of trespass. The Supreme Court of the State of Oregon, by the decision in this case, has injected such weighing process into the law of trespass. It has thus created an entirely new element in the law relating to that tort. The court stated in its opinion in

Martin v. Reynolds Metals Company (July 29, 1959), 68 Or. Adv Sh 1577, 1586

> "* * * the tort of trespass involves a weighing process, similar to that involved in the law of nuisance, although to a more limited extent than in nuisance and for a different purpose, i.e., in the one case to define the possessor's interest in exclusive possession, and in the other to define the possessor's interest in use and enjoyment."

The court is not definitive as to what factors will be a part of this weighing process. However, the court has recognized such process in the law of nuisance and has adopted the statement of that process set out by the Restatement of the Law of Torts. *York v. Stallings* (1959) 68 Or. Adv Sh 1105, 1111, 341 P2d 529, 533; *Amphitheaters, Inc., v. Portland Meadows* (1948) 184 Or. 336, 198 P2d 847. According to that authority, determination of whether an invasion is unreasonable in determining if a nuisance exists requires weighing "the

utility of the actor's conduct" against "the gravity of the harm." *Restatement of the Law of Torts*, § 826, p. 241. Consideration is made of the following factors in determining the gravity of the harm:

"(a) the extent of the harm involved;

"(b) the character of the harm involved;

"(c) the social value which the law attaches to the type of use or enjoyment invaded;

"(d) the suitability of the particular use or enjoyment invaded to the character of the locality;

"(e) the burden on the person harmed of avoiding the harm."

In determining the utility of the conduct, the following factors are considered:

Restatement of the Law of Torts, § 828, p. 250

"(a) social value which the law attaches to the primary purpose of the conduct;

"(b) suitability of the conduct to the character of the locality;

"(c) impracticability of preventing or avoiding the invasion."

Some or all of the above factors are obviously entitled to consideration in applying the new "weighing process."

Petitioner does not dispute the authority of the court in a proper case to adopt new standards heretofore not recognized as relevant in determining whether a trespass has occurred. Petitioner does object, however, to an adoption of any rule or definition which will be available to all litigants within the state of Oregon except petitioner.

B. The benefit of the "weighing process" has been denied to petitioner.

Because of the decision by the Supreme Court of the State of Oregon, litigants whose conduct would otherwise constitute a trespass are entitled to introduce evidence on some or all of the factors set forth above for the purpose of having the same "weighed." However, the court has, while making this new rule available to all who are situated as petitioner, summarily denied the benefit of the rule to petitioner.

Petitioner has been given no opportunity to introduce evidence on matters relevant to this weighing process. The trial court has been given no opportunity to apply the weighing process in this case and, as long as such weighing process is applicable to trespass actions, it is obvious that there will always be considerable evidence which the trial court should consider regarding utility of the petitioner's conduct in the legitimate

operation of an aluminum reduction plant as compared with the gravity of the harm claimed by respondents.

The court would concededly give others whose conduct may constitute a trespass the benefit of this rule of law. Petitioner should also be entitled to the benefit of the same rule. Accordingly, after the court had adopted this new and completely unanticipated rule, the cause should have been remanded to the trial court in order to permit petitioner to introduce relevant evidence and to allow the trial court to weigh the factors involved. Failure to do so was a discrimination by the court against petitioner.

C. The court has denied petitioner equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States by its failure to give petitioner the advantage of the weighing process.

The equal protection clause of the Fourteenth Amendment to the Constitution of the United States guarantees subjection to equal laws, applying alike to all in the same situation. *Southern R. Co. v. Greene* (1909) 216 US 400; *State of Oregon v. Pirkey* (1955) 203 Or. 697, 281 P2d 698. Application and administration of a law by a public authority with an unequal

hand, so as to in practice make unjust and illegal discriminations between persons in similar circumstances, has the same result as if the discrimination were incorporated in the law. *Yick Wo v. Hopkins* (1885) 118 US 356, 373. Such discrimination by unequal application of the law may appear on the face of the action taken with respect to a certain person or class of persons. *McFarland v. American Sugar Ref. Co.* (1915) 241 US 79.

The Supreme Court of the State of Oregon has formulated a new rule as part of the law of the state relating to trespass by injecting a "weighing process" into said tort. This rule, although novel, is fair on its face. However, here the court administered the new rule in a discriminatory fashion in summarily denying petitioner its benefits. This was done in spite of the fact that petitioner's claimed conduct was the cause for the formulation of the rule and was typical of the conduct to which such rule should be applied. Failure to give petitioner the benefit of this rule resulted in the denial to petitioner of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. For this reason petitioner respectfully urges that a writ of certiorari should issue to correct the violation of this fundamental constitutional guarantee.

III

The decision of the Supreme Court of the State of Oregon conflicts with the effective conduct of the national defense program by the federal government and interferes with the efficient operation of the basic economy of the nation.

The importance of the aluminum industry to the basic economy of the nation and to national defense is obvious. Consequently, the formulation or application of any rule of law in a manner as to in effect make such an industry strictly liable because of invisible effluents unavoidably escaping during the course of its operations must be viewed with grave concern. This is the situation which exists in the present case. The Supreme Court of the State of Oregon has

(1) Formulated a new definition of trespass which, if literally applied, would result in the imposition of tort liability upon segments of the community heretofore adjudged free of the same.

(2) Incorporated in the law of trespass a novel weighing process heretofore foreign to this tort.

(3) Failed to define the elements or factors to be considered where this weighing process is to be employed.

(4) Failed to apply the "weighing process" to this case, which the opinion indicates is typical of the cases where weighing should occur.

The net result of the opinion, therefore, is to establish a precedent whereby any court may find that a trespass has occurred as a result of a mere intrusion of tangible matter or intangible forces. In so doing, the court in question may disregard the so-called "weighing process" on the ground that the Oregon Supreme Court failed to apply the same.

Logically, there is no reason to restrict the application of this precedent to the aluminum industry. Other industries such as steel, oil, cement and fertilizer also produce fluoride compounds in the course of normal operations. Application of the rule, however, is not to be limited to fluoride compounds. The same may also be applied to many other industries producing effluents which settle on real property, or for that matter to nuclear fallout or even to the smoke particles from a simple chimney.

Thus, application of the rule to be derived from the opinion will undoubtedly result in the imposition of an intolerable burden upon various segments of the community, and especially industry. In addition, a new basis of liability will be established for recovery against

the federal government for invasions by radioactive fallout from nuclear tests. The fact of an invasion or "intrusion" having been established, then as a result of the contents of the opinion in this case liability would follow. In what way does this differ from the application of the doctrine of strict liability or liability without fault?

One can speculate endlessly as to the harmful results to be expected following the removal of industry from the protection of the well-defined rules of the law of nuisance and the consequent exposure to the harsher law of trespass. The nature and public importance of the conclusions set forth in the opinion are obvious. The matter is one not only involving private industry in general but also, of necessity, the national defense program.

The decision of the Supreme Court of the State of Oregon has established a precedent by which a staggering burden may be imposed on national defense industries and industries basic to the economy. This can result in a smothering effect upon the national defense program administered by the Congress under the Constitution of the United States. *Constitution of the United States*, Article I, Section 8. Because of the grave public importance of the question presented, petitioner respectfully urges that its petition for writ of certiorari should be granted by this court.

CONCLUSION

Because petitioner has been denied its fundamental constitutional right to equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and because of the vital importance of the issues presented to the public and to the basic industry of the nation, petitioner respectfully prays that its petition for a writ of certiorari to the Supreme Court of Oregon be granted.

Respectfully submitted,

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APPENDIX

PART 1

CIRCUIT COURT OF OREGON
Fourth Judicial District
Department No. 13
Portland 4, Oregon

Paul R. Harris
Judge

May 7, 1956

Messrs. George W. Mead &
Irving Rand
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Portland 4, Oregon

Re: Paul Martin and Verla Martin
husband and wife vs. Reynolds
Metals Company, a corporation
No. 223-612

Gentlemen:

At the conclusion of the evidence both the plaintiffs and the defendant submitted a motion for a directed

verdict. Thus the right to a jury trial was waived by all parties and the whole duty was cast upon the trial Judge of deciding the case. (Williams v. Corbett 286 Pacific 2d, (Ore) 115, 116.

The Court finds that between August 22, 1951 and January the 1st, 1956 the defendant continuously operated the aluminum reduction plant in question and in the operation thereof and as a result of such operation produced at said plant and caused to be emitted therefrom and to be blown over and deposited upon plaintiffs' land toxic and poisonous fluoride compounds in the form of gases; fumes and particulates; the Court further finds that this trespass upon and invasion of the land of the plaintiffs by said substances emanating from defendant's plant have during the period above mentioned rendered plaintiffs' land and the grasses and forage and drinking water thereon poisonous and toxic in character and unfit for consumption by livestock grazing upon said land, and that as a result thereof cattle grazing on said land during said period ingested more than a normal amount of fluorine; that the foregoing did materially and directly impair plaintiffs' land with reference to its use as a grazing property and except for the emanations from defendant's plant, plaintiffs' land would during the period above mentioned have been valuable for the producing, raising and fattening of beef cattle and livestock.

The Court further finds that because of the trespass by the defendant of plaintiffs' land above mentioned and the contamination resulting therefrom, plaintiffs have been unable to produce, raise, pasture or fatten livestock upon said ranch land and that thereby plaintiffs have been damaged in the loss of use of said land from August 22, 1951 to January the 1st, 1956 in the sum of $71,500.

In addition thereto and as a direct result of defendant's trespass as above set forth, the Court further finds that plaintiffs' land has been deteriorated by portions of the same having grown up to willows, brush, trees and weeds, and that the plaintiffs have been damaged thereby in the sum of $20,000.

The Court is of the opinion that the instant cause is not a proper one in which to award punitive damages.

(Wilfiams v Goose Lake Valley Irrigation Co., 83 ORE 302, 309-310.)

The plaintiffs urged during the trial of the cause that certain facts found by Chief Judge James Alger Fee in a case previously tried in the Federal District Court between the same parties were conclusively binding in the instant cause under the theory of estoppel by judgment. However, the Court is of the opinion that the facts found in the Federal case and claimed to be conclu-

sively binding here were not directly in issue in said cause in the sense of being actually determined as the decisive questions therein and are therefor not conclusive for the purpose of a subsequent suit on a different cause of action. The Court is of the opinion that said facts concluded in the former litigation were merely evidenciary of the matters directly in issue and not the decisive questions in issue in the former case.

(Judgments 50 CJS, Page 218, Section 730. Harvey v. Getchal, 190 ORE 205, 214-215. Farmers Bank v. Davis, 93 ORE 655, 666).

In view of the foregoing the Court hereby rules that the transcript in the case of Martin v. Reynolds Metals Company in the United States District Court is inadmissible as evidence in this case for the consideration of the Court as the trier of the facts and the Court has ignored said transcript in determining the issue of fact herein.

In conclusion, it may be stated that while not directly in point the case of Oregon-Washington R. & N. Co. v. Reed, 87 ORE 398, in the opinion of the Court comes closer to paralleling the instant cause than any other Oregon case. In the Reed case a railroad in changing its roadbed diverted the water of a brook so that it seeped through an embankment and damaged adjoining lands, injuring them for the purposes of pasturage.

The Oregon Supreme Court indicated that a continuing trespass upon the real property had been thereby, committed.

Counsel for the plaintiffs may prepare and submit findings, conclusions and judgment in conformity with the foregoing.

Yours very truly,
PAUL R. HARRIS, Judge.

PART II

No. 6278—July 29, 1959

IN THE SUPREME COURT OF THE STATE OF OREGON

IN BANC

MARTIN ET UX, *Respondents*, *v.* REYNOLDS METALS COMPANY, *Appellant*.

Appeal from Circuit Court, Multnomah County.

PAUL R. HARRIS, Judge.

Argued and submitted March 11, 1959.

Fredric A. Yerke, Jr., Portland, argued the cause for appellant. With him on the brief were King, Miller, Anderson, Nash & Yerke, Portland; Clifford N. Carlsen, Jr., Portland; Gustav B. Margraf, Richmond, Virginia and W. Tobin Lennon, Richmond, Virginia.

George W. Mead, Portland, and *Irving Rand*, Portland, argued the cause for respondents.

Before McALLISTER, C. J., LUSK, WARNER, PERRY, SLOAN, O'CONNELL and MILLARD, Justices.

AFFIRMED.

O'CONNELL, J.

This is an action of trespass. The plaintiffs allege that during the period from August 22, 1951 to January

1, 1956 the defendant, in the operation of its aluminum reduction plant near Troutdale, Oregon caused certain fluoride compounds in the form of gases and particulates to become airborne and settle upon the plaintiffs' land rendering it unfit for raising livestock during that period. Plaintiffs allege that their cattle were poisoned by ingesting the fluorides which contaminate the forage and water on their land. They sought damages in the amount of $450,000 for the loss of use of their land for grazing purposes and for the deterioration of the land through the growth of brush, trees and weeds resulting from the lack of use of the premises for grazing purposes. The plaintiffs also sought punitive damages in the amount of $30,000.

The plaintiffs and the defendant each moved for a directed verdict, whereupon the trial court found that the plaintiffs had suffered damage in the amount of $71,500 in the loss of use of their land and $20,000 for the deterioration of their land and entered judgment accordingly. The trial court rejected the plaintiffs' claim for punitive damages.

In the course of the pleadings the defendant raised the issue as to whether the complaint alleged a cause of action in trespass. The defendant contended that at most a cause of action in nuisance was stated. The trial court accepted the plaintiffs' theory of the case.

The principal assignments of error rest upon the defendant's contention that the trial court was mistaken in identifying the defendant's invasion of the plaintiffs' land as a trespass; that there was not sufficient evidence to establish a cause of action under any theory, but that if the court should find the evidence sufficient to give rise to liability the defendant's conduct constituted a nuisance and not a trespass.

Through appropriate pleadings the defendant set up the two-year statute of limitations applicable to nontrespassory injuries to land (ORS 12.110). If the defendant's conduct created a nuisance and not a trespass the defendant would be liable only for such damage as resulted from its conduct during a period of two years immediately preceding the date upon which plaintiffs' action was instituted. On the other hand, if the defendant's conduct resulted in a trespass upon plaintiffs' land the six year statute of limitations provided for in ORS 12.080 would be applicable and plaintiffs would be entitled to recover damages resulting from the trespasses by defendant during the period from August 22, 1951 to January 1, 1956.

The gist of the defendant's argument is as follows; a trespass arises only when there has been a "breaking and entering upon real property," constituting a direct, as distinguished from a consequential, invasion of the

possessor's interest in land; and the settling upon the land of fluoride compounds consisting of gases, fumes and particulates is not sufficient to satisfy these requirements.

Before appraising the argument we shall first describe more particularly the physical and chemical nature of the substance which was deposited upon plaintiffs' land. In reducing alumina (the oxide of aluminum) to aluminum the alumina is subjected to an electrolytic process which causes the emanation of fluoride compounds consisting principally of hydrogen fluoride, calcium fluoride, iron fluoride and silicon tetrafluoride. The individual particulates which form these chemical compounds are not visible to the naked eye. A part of them were captured by a fume collection system which was installed in November, 1950; the remainder became airborne and a part of the uncaptured particles eventually were deposited upon plaintiffs' land.

There is evidence to prove that during the period from August, 1951 to January, 1956 the emanation of fluorides from defendant's plant averaged approximately 800 pounds daily. Some of this discharge was deposited upon the plaintiffs' land. There is sufficient evidence to support the trial court's finding that the quantity of fluorides deposited upon plaintiffs' land

was great enough to cause $91,500 damage to the plaintiffs in the use of their land for grazing purposes and in the deterioration of their land as alleged.

We must determine, however, whether all or only a part of this damage may be shown; all, if the invasion constitutes a trespass, a part only (i.e. the damage which resulted within the two-year period of the statute of limitations) if the invasion was a nuisance and not a trespass.

Trespass and private nuisance are separate fields of tort liability relating to actionable inference with the possession of land. They may be distinguished by comparing the interest invaded; an actionable invasion of a possessor's interest in the exclusive possession of land is a trespass; an actionable invasion of a possessor's interest in the use and enjoyment of his land is a nuisance. 4 Restatement, Torts 224, Intro. Note Chapter 40.

The same conduct on the part of a defendant may and often does result in the actionable invasion of both of these interests, in which case the choice between the two remedies is, in most cases, a matter of little consequence. Where the action is brought on the theory of nuisance alone the court ordinarily is not called upon to determine whether the conduct would also result in a trespassory invasion. In such cases the courts treat-

ment of the invasion solely in terms of the law of nuisance does not mean that the same conduct could not also be regarded as a trespass. Some of the cases relied upon by the defendant are of this type; cases in which the court holds that the interference with the plaintiffs' possession through soot, dirt, smoke, cinders, ashes and similar substances constitute a nuisance, but where the court does not discuss the applicability of the law of trespass to the same set of facts. *York v. Stallings*, 68 Or Adv Sh 1105 (1959); *Lindley v. Hyland*, 173 Or 93, 144 P2d 295 (1943); *Bourne v. Wilson-Case Lumber Co.*, 58 Or 48, 113 P 52 (1911); *Columbian Carbon Co. v. Tholen*, 199 SW2d 825 (1947) (Tex Civ App); *Weller v. Snoqualmie Falls Lumber Co.*, 155 Wash 526, 285 P 446 (1930); *Sterrett v. Northport Mining & Smelting Co.*, 30 Wash 164, 70 P 266 (1902).

However, there are cases which have held that the defendant's interference with plaintiffs' possession resulting from the settling upon his land of effluents emanating from defendant's operations is exclusively nontrespassory. *Bartlett v. Grasselli Chemical Co.*, 92 W Va 445, 115 SE 451 (1922); *O'Neill v. San Pedro, L.A. & S.L.R. Co.*, 38 Utah 475, 114 P 127 (1911); *Thackery v. Union Portland Cement Co.*, 64 Utah 437, 231 P 813 (1924); see *Ryan v. City of Emmetsburg*, 232 Iowa 600, 4 NW2d 435 (1942). Although in such cases the separate particles which collectively cause the

invasion are minute, the deposit of each of the particles constitutes a physical intrusion and, but for the size of the particle, would clearly give rise to an action of trespass. The defendant asks us to take account of the difference in size of the physical agency through which the intrusion occurs and relegate entirely to the field of nuisance law certain invasions which do not meet the dimensional test, whatever that is. In pressing this argument upon us the defendant must admit that there are cases which have held that a trespass results from the movement or deposit of rather small objects over or upon the surface of the possessor's land.

Thus it has been held that causing shot from a gun to fall upon the possessor's land is a trespass. *Munro v. Williams, et al*, 94 Conn 377, 109 A 129 (pellets from an air gun fell upon land); *Peters v. Ambridge District Sportsmen's Assn.*, 14 Beaver 99 (Pen 1952) (shot from shotguns fell upon land); *DiGirolamo v. Philadelphia Gun Club*, 371 Pa 40, 89 A2d 357 (1952) (same); *Whittaker v. Stangvick, et al.*, 100 Minn 386, 111 NW 295 (1907) (same); *Herrin v. Sutherland*, 74 Mont 587, 241 P 328 (1925) (shotgun shot passing over surface of land).

The dropping of particles of molten lead upon the plaintiff's land has been held to be a trespass. *Van Alstyne v. Rochester Telephone Corp.*, 163 Misc 258,

296 NY Supp 726. And the defendant was held liable in trespass where spray from a cooling tower on the roof of its theater fell upon the plaintiff's land. *B & R Luncheonette, Inc., v. Fairmount Theatre Corp*, 278 App Div 133, 103 NY Supp2d 747.

The deposit of soot and carbon from defendant's mill upon plaintiff's land was held to be a trespass in *Young v. Fort Frances Pulp and Paper Co.*, 17 Ont Wkly Notes 6 (Canada 1919).

And liability on the theory of trespass has been recognized where the harm was produced by the vibration of the soil or by the concussion of the air which, of course, is nothing more than the movement of molecules one against the other. *McNeill v. Redington*, 67 Cal App2d 452, 154 P2d 428 (1945). Liability on this basis was clearly recognized in *Bedell, et ux v. Goulter, et al*, 199 Or 344, 361, 261 P2d 842 (1953), where Justice Lusk, after discussing the rule of *Rylands v. Fletcher*, LR 3 H L 330, continued with the following observation:

> "• • • And there is slight difficulty in holding that one who engages in blasting operations which set in motion vibrations and concussions of the earth and air which reach to another's land—no matter how far distant—and shatter his dwelling, commits a trespass no less than one who accomplishes the same result by the propulsion of rocks or other material. *Parcell v. United States*, [104 F Supp 110];

Bluhm v. Blanck & Gargaro, [62 Oh App 451, 24 NE2d 615]; 22 Am Jur 180, Explosions and Explosives, § 54. 'Is not a concussion of the air, and jarring, breaking, and cracking the ground with such force as to wreck the buildings thereon, as much an invasion of the rights of the owner as the hurling of a missile thereon?' *Louden v. City of Cincinnati*, [90 Oh St 144, 106 NE 970, LRA 1915E 356, Ann Cas 1916C 1171]."

The view recognizing a trespassory invasion where there is no "thing" which can be seen with the naked eye undoubtedly runs counter to the definition of trespass expressed in some quarters. 1 Restatement, Torts § 158, Comment h (1934); Prosser, Torts § 13 (2d Ed 1955). It is quite possible that in an earlier day when science had not yet peered into the molecular and atomic world of small particles, the courts could not fit an invasion through unseen physical instrumentalities into the requirement that a trespass can result only from a *direct* invasion. But in this atomic age even the uneducated know the great and awful force contained in the atom and what it can do to a man's property if it is released. In fact, the now famous equation $E = mc^2$ has taught us that mass and energy are equivalents and that our concept of "things" must be reframed. If these observations on science in relation to the law of trespass should appear theoretical

and unreal in the abstract, they become very practical and real to the possessor of land when the unseen force cracks the foundation of his house. The force is just as real if it is chemical in nature and must be awakened by the intervention of another agency before it does harm.

If, then, we must look to the character of the instrumentality which is used in making an intrusion upon another's land we prefer to emphasize the object's energy or force rather than its size. Viewed in this way we may define trespass as any intrusion which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist.

We are of the opinion, therefore, that the intrusion of the fluoride particulates in the present case constituted a trespass.

The defendant argues that our decision in *Amphitheaters, Inc. v. Portland Meadows*, 184 Or 336, 198 P2d 847 (1948) requires a contrary conclusion. In discussing the distinction between trespass and nuisance the court referred to a difference between "a cannon ball and a ray of light" indicating that the former but not the latter could produce a trespassory invasion. The court also said "The mere suggestion that the casting

of light upon the premises of a plaintiff would render a defendant liable without proof of any actual damage, carries its own refutation." 184 Or 336, 343. We do not regard this statement as a pronouncement that a trespass can *never* be caused by the intrusion of light rays or other intangible forces; more properly the case may be interpreted as stating that the conduct of the defendant in a particular case may not be actionable if it does not violate a legally protected interest of the plaintiff. The court states that the defendant is not liable *without proof of actual damage*. In that case the plaintiff contended that he had suffered damage in the form of a less efficient cinema screen due to the defendant's lights. In denying recovery the court found that there was no damage, apparently because whatever harm the plaintiff suffered was damnum absque injuria.

In every case in which trespass is alleged the court is presented with a problem of deciding whether the defendant's intrusion has violated a legally protected interest of the plaintiff. In most cases the defendant's conduct so clearly invades the well established possessory interest of the plaintiff that no discussion of the point is called for. But where neither the defendant's conduct nor the plaintiff's use fall within the familiar trespass pattern of the past the courts are faced with a preliminary inquiry as to whether the plaintiff has

a protectible interest under the law of trespass. This in turn calls for the inquiry as to whether the defendant's conduct was such as to constitute an invasion of that interest.

In some cases the solution can be based upon the ground that the defendant's conduct is not substantial enough to be regarded as a trespassory intrusion. Thus, the casting of a candle beam upon the screen of a drive-in theater would not constitute an actionable invasion, simply because the intrusion is so trifling that the law will not consider it and the principle de minimis non curat lex is applicable. In some cases the solution may be arrived at by admitting that the intrusion is substantial but refusing to recognize that plaintiff has a legally protected interest in the particular possessory use as against the particular conduct of the defendant. And so the glare of flood lights upon an adjoining owner's cinema screen, as in the Amphitheater case, may not be a trespass, not because the intrusion is trifling, but because the law does not wish to protect such a use from an invasion, whether the cause of the interference be viewed as a physical intrusion or as a nontrespassory act and covered by the law of nuisance.

The Amphitheaters case can be explained in terms of this latter point of view, i.e., that the glare of defendant's lights could be regarded as an intrusion

within the law of trespass, but that the plaintiff had no right to treat the intrusion as actionable in view of the nature of plaintiff's use and the manner in which the defendant interfered with it. Had the defendant purposely, and not as an incidence of his own legitimate use, directed the rays of light against the plaintiff's screen the court might well have taken the position that the plaintiff could have recovered in a trespass action. These illustrations demonstrate that the tort of trespass involves a weighing process, similar to that involved in the law of nuisance, although to a more limited extent than in nuisance and for a different purpose, i.e., in the one case to define the possessor's interest in exclusive possession, and in the other to define the possessor's interest in use and enjoyment.

As stated earlier, normally no inquiry is made in the trespass cases as to whether the plaintiff's interest in making a particular use of his property is within the protection provided for under the law of trespass, because traditionally the interest has been regarded as one clearly entitled to protection in the trespass field. There are adjudicated cases which have refused to find a trespass where the intrusion is clearly established but where the court has felt that the possessor's interest should not be protected. Thus it has been held that the flight of aircraft over the surface of plaintiff's land does

not constitute a trespass unless the intrusion interferes with the present enjoyment of property. *Hinman v. Pacific Air Transport*, 84 F2d 755 (9th Cir. 1936). The same result would seem to follow if the intrusion interfered with the present use of the land but where such use was not entitled to legal protection as against the socially desirable conduct of the defendant. Here it is apparent that the law of trespass and the law of nuisance come very close to merging. This is so because when inquiry is made as to whether the plaintiff's interest falls within the ambit of trespass law the courts look at the interference with the plaintiff's *use and enjoyment* of his land to determine whether his interest in *exclusive possession* should be protected and thus the two torts coalesce.

The Amphitheater case may also be viewed as a pronouncement that a possessor's interest is not invaded by an intrusion which is so trifling that it cannot be recognized by the law. Inasmuch as it is not necessary to prove actual damage in trespass the magnitude of the intrusion ordinarily would not be of any consequence. But there is a point where the entry is so lacking in substance that the law will refuse to recognize it, applying the maxim de minimis non curat lex. Thus it would seem clear that ordinarily the casting of a grain of sand upon another's land would not be a trespass. And so

too the casting of diffused light rays upon another's land would not ordinarily constitute a trespass. Conceivably such rays could be so concentrated that their entry upon the possessor's land would result in a trespassory invasion. An appropriate illustration is found in *Watson v. Mississippi River Power Co.*, 174 Iowa 23, 32, 156 NW 188, 191 (1916) where the court said:

> "• • • If, for example, a person interests himself in solar phenomena, and, while experimenting with a powerful sunglass, he accidentally focuses the instrument upon some inflammable material on the lot of his nextdoor neighbor, starting a blaze which results in injury and loss to the latter, can it be said there was no trespass, no actual invasion of the neighbor's premises?"

But where the light is cast upon the plaintiff's premises in a manner which does no actual damage or causes no interference in any way with a legitimate use of the premises then there is no reason for recognizing an invasion of the plaintiff's possessory interest. Note 62 Harv L Rev 704 (1949). Here again it is important to point out that the tort of trespass is composed of components which include the character (including the magnitude) of the defendant's conduct in causing an intrusion and the character (including the magnitude) of the harm visited on the plaintiff in interfering with his interest in the exclusive possession of the premises.

Consequently the question as to whether a ray of light or any other intrusion is so unsubstantial that it is to be disregarded under the de minimis principle cannot be looked at solely from the standpoint of the defendant's conduct, but it must be evaluated with reference to the nature of the plaintiff's interest. The broader and more diverse the possessor's protectible interests the more sensitive they are to violation by the defendant and the easier it is to find that his conduct, although apparently inconsequential, gives rise to liability. The scope of the possessor's legitimate interest in the exclusive possession of land is broad and difficult to define specifically. Once recognizing that actual damage need not be shown in making out an actionable invasion, the plaintiff's right to insist upon freedom from interference with his possession seems almost limitless.

But there are limits and they can be found, if only vaguely, in the reasons for protecting the possessory interest of the landholder where no actual damage is suffered. It is sometimes said that the plaintiff is permitted to recover in order to prevent a loss of interest by the running of the statute of limitations. 1 Harper & James, Torts, § 1.8, p 25 and 26; *Whittaker v. Stangvick*, supra; *Bragg v. Laraway*, 65 Vt 673, 27 A 492 (1893). But this is not a respectable reason because the statute could be made inapplicable by holding that no cause

of action arose for the harmless invasion. The modern law of trespass can be understood only as it is seen against its historical background. Originally all types of trespass, including trespass to land, was punishable under the criminal law because the trespasser's conduct was regarded as a breach of the peace. When the criminal and civil aspect of trespass were separated, the civil action for trespass was colored by its past, and the idea that the peace of the community was put in danger by the trespasser's conduct influenced the court's ideas of the character of the tort. Therefore, relief was granted to the plaintiff where he was not actually damaged, partly at least as a means of discouraging disruptive influences in the community. Winfield on Torts (4th ed) p 305 expresses the idea as follows:

> "The law, on the face of it, looks harsh, but trespass was so likely in earlier times to lead to a breach of the peace that even unwitting and trivial deviations on to another person's land were reckoned unlawful. At the present day there is, of course, much greater respect for the law in general and appreciation of the security which it affords, and the theoretical severity of the rules as to land trespass is hardly ever exploited in practice."

The idea is similarly expressed in 1 Harper & James, Torts, § 1.8, p 25:

> "In the early law, emphasis was placed upon the criminal aspect of willful trespasses, as a breach of the peace or a wrong to the state. Compensation to the injured victim was regarded as of secondary importance. It came about, therefore, that the rule developed that the plaintiff might recover nominal damages even though he sustained no actual pecuniary loss as a result of the trespass."

If then, we find that an act on the part of the defendant in interfering with the plaintiff's possession, does, or is likely to result in arousing conflict between them, that act will characterize the tort as a trespass, assuming of course that the other elements of the tort are made out. The importance of this consideration in describing a trespass to land is evident in many of the modern cases. *Fincannon v. Sudderth*, 144 N C 587, 57 SE 337 (1907); *Bragg v. Laraway*, supra; *Whittaker v. Stangvick*, supra.

Probably the most important factor which describes the nature of the interest protected under the law of trespass is nothing more than a feeling which a possessor has with respect to land which he holds. It is a sense of ownership; a feeling that what one owns or possesses should not be interfered with, and that it is entitled to protection through law. This being the nature of the

plaintiff's interest, it is understandable why actual damage is not an essential ingredient in the law of trespass. As pointed out in 1 Harper & James, Torts, § 1.8, p 26, the rule permitting recovery in spite of the absence of actual damages "is probably justified as a vindictatory right to protect the possessor's proprietary or dignitary interest in his land."

We think that a possessor's interest in land as defined by the considerations recited above may, under the appropriate circumstances, be violated by a ray of light, by an atomic particle, or by a particulate of fluoride and, contrariwise, if such interest circumscribed by these considerations is not violated or endangered, the defendant's conduct, even though it may result in a physical intrusion, will not render him liable in an action of trespass. *Amphitheaters, Inc. v. Portland Meadows*, supra.

We hold that the defendant's conduct in causing chemical substances to be deposited upon the plaintiffs' land fulfilled all of the requirements under the law of trespass.

The defendant contends that trespass will not lie in this case because the injury was indirect and consequential and that the requirement that the injury must be direct and immediate to constitute a trespass was not met. We have held that the deposit of the particu-

lates upon the plaintiff's land was an intrusion within the definition of trespass. That intrusion was direct. The damages which flowed from it are consequential, but it is well established that such consequential damage may be proven in an action of trespass. *Van Alstyne v. Rochester Telephone Corp.*, supra; 1 Restatement, Torts, § 163; Prosser, Torts (2d ed) p 57. The distinction between direct and indirect invasions where there has been a physical intrusion upon the plaintiff's land has been abandoned by some courts. See Prosser, Torts (2d ed) p 56; 1 Restatement, Torts, § 158, Comment h. Since the invasion in the instant case was direct it is not necessary for us to decide whether the distinction is recognized in this state.

The trial court found that the fluoride compounds emitted from the defendant's plant between August 22, 1951 and January 1, 1956 rendered plaintiff's land and the drinking water on the land unfit for consumption by livestock grazing thereon. The defendant contends that there is no substantial evidence to support this finding. In support of this contention the defendant points to the effectiveness of the fume control system which was installed in 1950 prior to August 22, 1951, the beginning of the period during which the plaintiffs alleged that the damage occurred. The evidence is conflicting but there is substantial evidence from which the

trial court could have connected the emanation of the fluorides with the damage alleged. We cannot, therefore, disturb the trial court's finding.

It is also urged that the trial court erred in failing to enter a special finding requested by the defendant. The requested finding in effect stated that it was impossible in the operation of an aluminum reduction plant to capture all fluorides which are created in the manufacturing process; that the fume collection system was in operation during the period in question; and that it was the most efficient of the systems known in aluminum reduction plants in the United States.

It is argued that since the trial court elected to enter special rather than general findings it was required by ORS 17.430 to enter findings on all material issues which, it is claimed, would include the issue defined in the requested findings. The complaint alleged that the defendant "carelessly, wantonly and willfully continuously caused to be emitted," from its plant the poisonous compounds. This allegation was denied in the defendant's answer. The issue thus raised, as to the character of defendant's conduct in making the intrusion upon plaintiff's land, would be material only with respect to the claim for punitive damages which, as we have already indicated, was rejected by the trial court. Since we hold that the intrusion in this case

constituted a trespass it is immaterial whether the defendant's conduct was careless, wanton and willful or entirely free from fault. Therefore, the refusal to enter the requested finding is not error.

The judgment of the lower court is affirmed.

McALLISTER, C.J., specially concurring.

I concur in the result of the above opinion but dissent from that portion thereof that attempts to reconcile the holding in this case with the holding in the case of *Amphitheaters, Inc. v. Portland Meadows*, 184 Or 336, 198 P2d 847.

FILE COPY

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In the Supreme Court
of the United States

OCTOBER TERM, 1959

No. 691

REYNOLDS METALS COMPANY, a corporation,
Petitioner,

v.

PAUL MARTIN and VERLA MARTIN, husband and wife,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 2-60

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In the Supreme Court
of the United States

OCTOBER TERM, 1959

No. 691

REYNOLDS METALS COMPANY, a corporation,
Petitioner,

v.

PAUL MARTIN and VERLA MARTIN, husband and wife,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents submit the following, as permitted by Rule 24, in opposition to the granting of the petition for a writ of certiorari.

THE FACTS

This case involves nothing more than an award of damages for injury caused by petitioner's tortious conduct. Petitioner [defendant in the trial court; appellant in the Oregon Supreme Court] spilled forth from its factory tons of poisonous fluoride compounds, which settled upon the near-by lands of respondents, poisoned

the forage thereon, and prevented use of the land for grazing cattle.

The trial court awarded respondents damages. The Oregon Supreme Court affirmed. A petition by petitioner for a rehearing was denied.

STATUTE OF LIMITATIONS

Petitioner states, "the ultimate question involved in this case is whether the two or the six year statute of limitations is applicable." (Petition for Writ, p. 17.)

The question of whether recovery was limited to recovery for the damage occasioned within two years before the commencement of the action was never raised in the trial court by demurrer, pleading, motion or otherwise, and was not an issue between the parties required to be passed upon by the Oregon Supreme Court. This question could have become important only if it had been made an issue in this particular case, but even so would have been only a matter of local law.

Continuously between August, 1951 and January, 1956, petitioner, in the operation of its factory, emitted each day some 800 pounds of these poisons, and toxic quantities were deposited upon plaintiffs' land (Petition for Writ, p. 37). Under the circumstance of this continuous course of tortious conduct, the statute of limitations (whichever might be applicable) commences to run only when the exposure ceases. The Oregon Supreme Court in this case had no occasion to consider or discuss this rule of law, but it is the settled rule in Oregon. Rey-

nolds Metals Co. v. Yturbide (C.C.A. Ninth Circuit 1958), 258 F. 2d 321, certiorari denied, 358 U.S. 840, 79 S. Ct. 66; Shives v. Chamberlain, 168 Or. 676, 126 P. 2d 28; Hotelling v. Walther, 169 Or 559, 130 P. 2d 944. See also Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018.

FEDERAL QUESTION

Petitioner claims that federal questions, here sought to be reviewed, were raised in the Oregon Supreme Court in a petition for rehearing, and that somehow refusal of the Oregon Supreme Court to rehear the case deprives petitioner of the equal protection of the law.

Under Rule 23(f) petitioner must specify the manner in which the federal question sought to be reviewed was raised. Does the petition for rehearing in the Oregon Supreme Court raise any federal question?

This petition for rehearing (which is in the record in this Court) names four "particulars" in which the court is said to have "erred." In summary they are:

1. The opinion of the Oregon Supreme Court contains an erroneous definition of the tort of trespass.

2. The Oregon Supreme Court should have held petitioner guilty at most of conduct constituting a nuisance.

3. The Oregon Supreme Court in its opinion placed an erroneous construction upon its opinion in an earlier case (1948).

4. The result of the opinion would place a burden on "all segments of the population" and in particular (A)

upon industries functioning in the national defense program; (B) upon industries such as steel, fertilizer and lumbering; and (C) upon a householder permitting "any particulate" to be carried through the air "from his own to an adjoining freehold."

Considering particulars 1 and 2, we need only mention that the describing of a tort committed by petitioner as a trespass rather than a nuisance does not deprive petitioner of property without due process of law. Affirming a proper, just and correct judgment of a trial court with the use of wrong or inapt phrases in an opinion harms no one, and raises no constitutional issue. The Oregon Supreme Court said (Petition for Writ, p. 36) that the trial court was not "mistaken in identifying the defendant's invasion of the plaintiffs' land as a trespass." However the invasion with these poisons might be characterized, liability for the damage occasioned thereby follows under Oregon law. Mendenhall v. Water Company, 27 Or. 38, 39 P. 399; Roots v. Boring Junction Lumber Co., 50 Or. 298, 92 P. 811, 94 P. 182; Matthews v. Chambers Power Co., 81 Or. 251, 159 P. 564; Kesterson v. California Oregon Power Co., 114 Or. 22, 228 P. 1092; Huber v. Portland Gas & Coke Co., 128 Or. 363, 274 P. 509; Brown v. Gessler, 191 Or. 503, 230 P2d 541; Bedell v. Goulter, 199 Or. 344, 261 P. 2d 842; Ure v. United States, 93 Fed. Supp. 779 (reversed on other grounds, 225 F. 2d 709).

Neither does an erroneous construction of an opinion in some other case between other parties deprive a person of any constitutional right. The judgment against petitioner in this case should have been affirmed (as it

was) whether the Oregon Supreme Court referred to or mentioned in its opinion any earlier cases or whether it did not, or whether it even wrote any opinion or not.

As to the fourth particular, it seems superfluous to remind this Court that industrial corporations remain liable for their torts whether they be aluminum factories, steel plants or fertilizer manufacturers. Paying for damage occasioned by tortious activities may be painful or distasteful, but there is no constitutional shield against being compelled to do so.

CONCLUSION

The only pretended federal question, here presented, is a question such as could just as well have been raised in the trial court and reviewed by the Oregon Supreme Court. The question, if otherwise of any validity, was not raised at "the first opportunity." Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673. The claim is furthermore without merit. Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358.

It is respectfully submitted that there is no substantial federal question presented for review, and that the petition for writ of certiorari should be denied.

Respectfully submitted,

GEORGE W. MEAD,
IRVING RAND,
Attorneys for Respondents,
1211 Public Service Building,
Portland 4, Oregon.

CERTIFICATE OF SERVICE

I, George W. Mead, one of the attorneys for Respondents herein and a member of the bar of the Supreme Court of the United States, hereby certify that on the day of February, 1960, I served copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari upon the Petitioner, Reynolds Metals Company, by mailing copies in duly addressed envelopes, with first class postage prepaid, to its attorneys of record, as follows:

To Gustav B. Margraf and W. Tobin Lennon, Reynolds Metals Building, Richmond, Virginia, they being Counsel for Petitioner and that being their post-office address; and by delivering copies thereof at the office of King, Miller, Anderson, Nash & Yerke, and Frederic A. Yerke, Jr., in the American Bank Building, Portland 5, Oregon, they being the Attorneys for Petitioner.

Dated at Portland, Oregon, this day of February, 1960.

GEORGE W. MEAD,
Of Counsel for Respondents.

FILE COPY

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In the

Supreme Court of the United States

OCTOBER TERM, 1959

No. 691

REYNOLDS METALS COMPANY,
a corporation, *Petitioner*,

v.

PAUL MARTIN and VERLA MARTIN,
husband and wife, *Respondents*.

PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF

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DAILY JOURNAL OF COMMERCE

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No. 691

In the Supreme Court of the United States

October Term, 1959

REYNOLDS METALS COMPANY,
a corporation, *Petitioner*,

vs.

PAUL MARTIN and VERLA MARTIN,
husband and wife, *Respondents*.

PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF

February 10, 1960, petitioner's Petition for Writ of Certiorari to the Supreme Court of the State of Oregon in the above-entitled and number cause was docketed by the clerk of this court. February 24, 1960, respondents served on petitioner their Brief in Opposition to Petition for Writ of Certiorari. Petitioner respectfully submits this Reply and Supplemental Brief in accordance with the provisions of Rule 24(4) of the Revised Rules of the Supreme Court of the United States.

I. Misstatements and Erroneous Conclusions contained in respondents' Brief in Opposition to Petition for Writ of Certiorari.

The following comments are respectfully submitted to the Court to correct several misstatements and erroneous conclusions contained in respondents' Brief in Opposition to Petition for Writ of Certiorari:

STATUTE OF LIMITATIONS

A. At page two of their Brief in Opposition to Petition for Writ of Certiorari, respondents state that the question as to the applicable statute of limitations was never raised in the trial court, and was not an issue before the Supreme Court of the State of Oregon. This is not true.

As indicated in the Petition for Writ of Certiorari (pp. 6, 11), the Oregon statute of limitations applicable to trespass actions is six years, *1 Oregon Revised Statutes, Section 12.080, p. 76*, and that applicable to nuisance actions is two years, *1 Oregon Revised Statutes, Section 12.110, p. 76*. Thus, determination in this case of the proper basis of liability was vital. Accordingly, petitioner raised the distinction between the torts of trespass and nuisance at all stages of the proceedings herein and at every possible opportunity. That issue

was raised by motions to strike the characterization of the action as trespass, by demurrer, and by the affirmative pleading of the two year statute of limitations in the answer to the second amended and supplemental complaint. It was urged on appeal to the Supreme Court of the State of Oregon. This is all part of the record before this Court. The question of the applicable statute of limitations has, therefore, been one of the vital issues in this case from its very inception.

B. At page two of their Brief in Opposition to Petition for Writ of Certiorari, respondents state that, even if the statute of limitations were an issue in this case, it would have been only a matter of local law, suggesting by reason of this that it is not a matter of concern to this Court.

It is true that the statute of limitations itself is a matter of local law. However, discrimination in applying the principles of law involved in determining what is the applicable statute of limitations in violation of the Fourteenth Amendment to the Constitution of the United States is not a matter of local law, but is a violation of a federal right. There has been this type of discrimination in this case by the Supreme Court of the State of Oregon, as indicated by petitioner in its Pe-

tition for Writ of Certiorari to the Supreme Court of the State of Oregon.

C. At page two of their brief, respondents contend that, inasmuch as the aluminum reduction plant continued to emit fluorides, some of which settled on respondents' lands, the statute of limitations never commenced to run.

This argument is obviously fallacious. If respondents' view of the law is accepted, application of the same in any case could lead to absurd results. Thus, if an industrial plant operated for a period of 20 years and a person claiming injuries to personal or real property became aware of the same during the first or second year, rather than having the claim barred two years later by the statute of limitations, the claim would still be alive and capable of being asserted as far as 20 years hence. This, of course, is contrary to considerations of public policy as well as the traditional attitude of the courts and legislatures in seeking to limit the time within which claims may be asserted to a reasonable period.

Furthermore, whatever may be the rule in this respect as to humans suffering personal injuries, the traditional rule as to property damage has been entirely different. A cause of action with respect to claims for

injuries allegedly arising out of the operation of an industrial plant accrues when the effluents first cause observable injury. *Sterrett v. Northport Mining & Smelting Co.* (1902) 30 Wash. 164, 70 Pac. 266; *Hill v. Empire State-Idaho Mining & Developing Co.* (CC Ida., 1908) 158 Fed. 881; *Arkebauer et al. v. Falcon Zinc Co.* (1929) 178 Ark. 943, 12 S.W. 2d 916; *Person v. City of Independence* (Mo. App., 1938) 114 S.W. 2d 175; *H. F. Wilcox Oil & Gas Co. v. Juedeman* (1940) 187 Okl. 382, 101 P. 2d 1050; *54 C.J.S., 11, Limitation of Actions, Section 109.* Where injuries are sustained from a continuing trespass or nuisance, plaintiff may recover only for such damages as have accrued during the statutory period. *Doran v. City of Seattle* (1901) 24 Wash. 182, 64 Pac. 230; *Sterrett v. Northport Mining & Smelting Co.* (1902) 30 Wash. 164, 70 Pac. 266; *Weller v. Snoqualmie Falls Lbr. Co.* (1930) 155 Wash. 526, 285 Pac. 446; *Norwood v. Eastern Oregon Land Co.* (1932) 139 Or. 25, 37; 39, 5 P. 2d 1057, 7 P. 2d 996; *Minyard v. Woodward Iron Co.* (D.C., Ala., 1948) 81 F. Supp. 414; *Parro v. Fifteen Oil Co.* (La. App., 1946) 26 So. 2d 30; *Ricou v. International Paper Co.* (D.C., La., 1953) 117 F. Supp. 128; *Stanley Development Co. v. Millburn TP* (1953) 26 N.J.S. 185, 97 A. 2d 743.

FEDERAL QUESTION

D. At page three of their Brief in Opposition to Petition for Writ of Certiorari, respondents argue

1. That

"* * * the describing of a tort committed by petitioner as a trespass rather than a nuisance does not deprive petitioner of property without due process of law."

2. That

"Affirming a proper, just and correct judgment of a trial court with the use of wrong or inapt phrases in an opinion harms no one and raises no constitutional issue."

3. And that

"Neither does an erroneous construction of an opinion in some other case between other parties deprive a person of any constitutional right."

This is not a correct statement of petitioner's position. Petitioner contends that the Supreme Court of the State of Oregon denied it equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States in that

1. It did not accord petitioner the benefit of common law principles of the State of Oregon regarding the distinction between the torts of trespass and nuisance, and

2. It failed to give petitioner the benefit of a new rule of law which by definition it would accord to others similarly situated.

E. At page five of their Brief in Opposition to Petition for Writ of Certiorari, respondents state that there is no constitutional protection against tort liability by industries.

Petitioner does not contend that industries should not be liable for their torts. Petitioner does contend that, in fixing industrial tort liability, a rule tantamount to strict liability should not be applied and is, in fact, discriminatory. When, as here, that has occurred, a question of great public importance is presented.

II. Supplemental Authority

After petitioner's Petition for Writ of Certiorari was docketed by the clerk of this Court, petitioner received a copy of the University of Detroit Law Journal of December, 1959, containing a comment on the decision of the Supreme Court of the State of Oregon in this case. The comment was as follows (pp. 311-315):

> **"TRESPASS—Settling on Plaintiffs' Land of Airborne Particulates from Defendant's Aluminum Reduction Plant Constitutes a Trespass.** *Martin v. Reynolds Metals Co.*, — Ore. —, 342 P.2d 790 (1959). Plaintiffs, owners of a large cattle farm, sought recovery in trespass for damage to their land and livestock caused by the settling of certain fluoride compounds in the form of gases and particulates which defendant, operator of adjoining aluminum plant, had allowed to become airborne. Defendant contended

that the cause of action was in nuisance and hence fell within the two-year statute of limitations applicable to non-trespassory injuries to land. The trial court accepted the trespass theory of plaintiffs' case and defendant appealed. *Held:* Affirmed. The settling upon plaintiffs' land of airborne fluoride compounds in the form of gases and particulates constitutes a trespass for which the defendant is strictly liable.

"There is an ever increasing reluctance on the part of courts to preserve the technical distinctions which have traditionally bound the various forms of action. While these distinctions may become unjustly nice under peculiar circumstances, nevertheless the advantages to be gained from their total abandonment must be measured against the confusion likely to attend a theory of liability too vague to define. Thus, the traditional differences between trespass and trespass on the case may be unduly academic for the modern court in many instances, but unless the legislature is equally as modern as the court in establishing statutes of limitation consistent with modern judicial definitions of the various causes of action, these differences can assume an expensive immediacy. Upon them hinged exactly two-thirds of the damages in the instant case.[1]

"Situations similar to that in the *Martin* case have generally been relegated to the law of nuisance.[2] The fact that they have been found to support an action in trespass illustrates the confusing

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"1. There is a six year limitation on trespass actions, a two year limitation on non trespassory actions.

"2. Arvidson v. Reynolds Metals Co., 125 F. Supp. 481 (W.D. Wash. S.D. 1954) (fluoride particulates); Thackery v. Union Portland Cement Co., 64 Utah 437, 231 Pac. 813 (1924); (dust and smoke); O'Neill v. San Pedro, L.A. & S.L. Ry. Co., 38 Utah 475, 114 Pac. 127 (1911) (smoke and cinders); Bartlett v. Grasselli Chemical Co., 92 W. Va. 445, 115 S.E. 451 (1922) (reduction of zinc ore)

merger which is fast taking place between the two fields.

"In spite of the exception and change to which the traditional elements of trespass have been subject, the authorities generally have continued to assume that the action will only lie where there has been an invasion of another's right to exclusive possession by a person or thing.[3] There has been no attempt, however, to limit definitively the nature of the "thing" which will constitute an entry. Where there exists a tangible substance occupying space with which the plaintiff must share possession there is little difficulty recognizing an entry. This has been the traditional concept of trespassory invasion. A major challenge to this concept appeared with the development of explosives and their use by industry. The problem is amply illustrated by a famous series of blasting cases in which the New York courts consistently distinguished damage caused by the arrival of rock upon the plaintiff's land from the equally damaging results of concussion and vibration. In the former instance the defendant was held strictly liable,[4] yet in the latter damage was *absque injuria* without proof of negligence.[5] Conscious of the injustice which such a rule produced, many other jurisdictions condemned the

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"3. Restatement, Torts, § 158 comments *b* and *h*; Prosser, Torts, § 13 2d ed. 1955); Keeton, *Trespass, Nuisance, and Strict Liability*, 59 Colum. L. Rev. 457, 468 (1959).

"4. Hay v. Cohoes Co., 2 N.Y. 159 (1849) (leading case).

"5. Benner v. Dredging Co., 134 N.Y. 156, 31 N.E. 328 (1892); Booth v. Rome, Watertown & O. T. Ry. Co., 140 N.Y. 267, 35 N.E. 592, 24 L.R.A. 105, 37 Am. St. Rep. 552 (1893) (leading case); Holland House Co. v. Baird, 169 N.Y. 136, 62 N.E. 149 (1901); Sullivan v. Dunham, 10 App. Div. 438, 41 N.Y. Supp. 1083 (1896). *Accord*, Campbell v. Adams, 228 Ky. 156, 14 S.W. 2d 318 (1929); Gibson v. Womack, 218 Ky. 626, 291 S.W. 1021 (1927); Hickey v. McCabe, 30 R.I. 346, 75 Atl. 404 (1910); Indian Territory Illuminating Oil Co. v. Rainwater, 140 S.W. 2d 491 (Tex. Civ. App. 1940).

distinction as one without a difference.[6] Yet the conceptual distinction upheld by the New York courts was valid according to the traditional definition of trespass. In haste to impose strict liability in either case, the majority of the courts looked to the nature of the damaging instrument and ignored the manner in which the instrument caused the damage.[7] Because the result in either case would be the same, little attention was given to the nature of defendant's conduct—whether a trespass or a nuisance. It is significant, therefore, that the court in the *Martin* case should refer to the concussion and vibration cases as precedent for the following:

> "'[W]e may define trespass as any intrusion which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist.'[8]

"The authorities state that trespass and nuisance are fundamentally separated by the interests they protect.[9] The respective realms of the two actions are not sovereign, however, even when viewed from this aspect. If vibrations,[10] or dust,[11] or particulates[12] interfere with *exclusive possession* it is only because their physical or psychological effect is such as to so

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"6. McKenna v. Pacific E. Ry. Co., 104 Cal. App. 538, 286 Pac. 699 (1904); Louden v. City of Cincinnati, 10 Ohio St. 144, 106 N.E. 970 (1914). Patrick v. Smith, 75 Wash. 407, 134 Pac. 1076 (1913). See generally, Smith, *Liability For Damage To Land By Blasting*, 33 Harv. L. Rev. 542, 607 (1920).

"7. "The agency employed in either case is the same, and the danger as imminent in one instance as in the other." Longtin v. Persell, *supra* note 6 at 313.

"8. 342 P.2d at 794.

"9. Prosser, Torts, § 13 (2d ed. 1955); 1 Harper & James, Torts, §§ 1.2, 1.3 (1956).

"10. Cases collected in note 6 *supra*.

"11. Thackery v. Union Portland Cement Co., 64 Utah 437, 231 Pac. 813 (1924).

"12. Arvidson v. Reynolds Metals Co., 125 F. Supp. 481 (W.D. Wash. S.D. 1954).

interfere with *use and enjoyment* that an owner is driven from his land. A similar confusion of the two interests is being brought out by the current air travel controversy.

"The extent of the right to exclusive possession had been determined by reference to Lord Coke's famous maxim, 'cujus est solum ejus est usque ad coelum.'[13] This presented serious consequences for the aviation industry. Anxious to save the airman from technical trespass, theories were advanced which determined extent of possession by standards based on use and enjoyment.[14] A foreshadowing of the *Martin* opinion occurs in *Hinman v. Pacific Air Transport*[15] where it was held that there can be no title to air space unconnected with the use of land and hence no trespass to air space in the absence of actual damage to present use and enjoyment. The *Restatement* has managed to remain consistent by retaining the *ad coelum* doctrine and holding that legitimate travel in space possessed by another, while ordinarily a trespass, is privileged by law.[16] The test applied in the *Martin* case is, then, but an

"13. COKE, LITTLETON, 4a. An excellent discussion of the air space controversy by Howard H. Hackley, *Trespassers In The Sky*, 21 MINN. L. REV. 773 (1937) traces the origins and history of the *ad coelum* maxim. It is there pointed out that Coke's maxim was itself first applied to nuisance cases and did not refer to extent of ownership or possession.

"14. The 'zone' theory limits a landowner's right to the extent of his 'effective possession' or that which the nature of his use may in the future require. *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N.E. 385 (1930). The 'actual use' theory denies rights to all air space except that presently in use by the landowner. *Hinman v. Pacific Air Transport*, 84 F.2d 755 (9th Cir. 1936), *cert. denied*, 57 Sup. Ct. 431 (1937). The nuisance theory does not recognize ownership in air space at all, but gives a remedy in nuisance for substantial damage to present use. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

"A use and enjoyment test was used to limit extent of sub surface possession in *Boehringer v. Montalto*, 142 Misc. 560, 254 N.Y. Supp. 276 (1931).

"15. 84 F.2d 755 (9th Cir. 1936).

"16. RESTATEMENT, TORTS, § 194.

extension of the use of nuisance terminology already appearing in the law of trespass.

> "'[W]hen inquiry is made as to whether the plaintiff's interest falls within the ambit of trespass law the courts look at the interference with the plaintiff's *use and enjoyment* of his land to determine whether his interest in *exclusive possession* should be protected. . . .'[17]

"The common law requirement that an injury be direct in order to support trespass has been abandoned by the *Restatement*.[18] Many of the courts, on the other hand, have found in this requirement a valuable means of restricting what threatens to be an ever more elusive and expansive action. With an understandable reluctance to pass on the entry capabilities of dust,[19] or vibrations,[20] or cinders,[21] or particulates,[22] recovery is denied in trespass because the injury is consequential. The *Martin* opinion pays lip service to a need for direct injury,[23] an alternative, granted an interference with possession, would be an acknowledged adoption of the *Restatement* position and a holding that the intervention of wind and atmospheric conditions made the injury clearly consequential.

"Some have advocated a change in the common law presumption of damage in trespass except in the

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"17. 342 P.2d at 795.

"18. RESTATEMENT, TORTS, § 158 comment *h*.

"19. Thackery v. Union Portland Cement Co., 64 Utah 437, 231 Pac. 813 (1924).

"20. Gibson v. Womack, 218 Ky. 626, 291 S.W. 1021 (1927); Booth v. Rome, 140 N.Y. 267, 35 N.E. 592 (1893).

"21. O'Neill v. San Pedro, 38 Utah 475, 114 Pac. 127 (1911).

"22. Arvidson v. Reynolds Metals Co., 125 F. Supp. 481 (W.D. Wash. S.D. 1954).

"23. 'We have held that the deposit of the particulates upon the plaintiff's land was an intrusion within the definition of trespass. That intrusion was direct.' 342 P.2d at 797.

case of intentional invasions.[24] The *Martin* opinion is not clear on this question. On the one hand there is an extended discussion as to why actual damage is not required.[25] On the other hand damage would seem to be an essential element in determining whether plaintiff has a legally protected interest in exclusive possession. The difficulty stems from the court's attempt to reconcile the *Martin* case with its holding in *Amphitheatres, Inc. v. Portland Meadows*.[26] That case was decided on a nuisance theory and recovery denied upon the principles of *de minimis* and the extra-sensitive use of land. The effect of this attempted reconciliation is to impose the *de minimis* principle upon the law of trespass and thereby leave little room for the recovery of nominal damages. After considering the entry capabilities of light rays, the court concludes that such an instrumentality could accomplish a trespass.

> "'But where the light is cast upon the plaintiff's premises in a manner which does no actual damage or causes no interference in any way with a legitimate use of the premises then there is no reason for recognizing an invasion of the plaintiff's possessory interest.[27]'

"The court refused appellant's request for a finding on the nature of its conduct—whether inten-

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"24. RESTATEMENT, TORTS, § 163; PROSSER, TORTS, § 13, 1 HARPER & JAMES, TORTS, §§ 1.3 1.4.

"25. 342 P.2d at 796.

"26. 184 Ore. 336, 198 P.2d 847 (1948). Action by operators of drive-in motion picture theatre against operators of adjoining race track for damages caused by the reflection of light from track upon plaintiff's movie screen. Plaintiff contended that the light rays constituted a trespass. 'While the line between trespass and nuisance is not always a sharp one, we think that the case at bar is governed by the law of nuisance, and not the law of trespass.' The entry capabilities of light were dismissed with the comment that 'we need not argue the distinction between a cannon ball and a ray of light.' 198 P.2d at 850.

"McAllister, C.J., concurred specially in the *Martin* case, objecting to the attempt to reconcile that case with the *Amphitheatres* case.

"27. 342 P.2d at 795.

tional, negligent, or free of fault—contenting itself with a statement that defendant had committed a trespass and would, therefore, be strictly liable.[28] Implicit in such a finding is the modern philosophy that the high profits of industry should indemnify innocent property owners against loss occasioned by the unavoidable consequences of operation.[29] The proper vehicle for such a philosophy would seem, however, to be nuisance where there can be a more orthodox weighing of the social value to be gained from defendant's conduct against the need to protect plaintiff in the free and complete enjoyment of his land. Certainly novel causes of action are bound to arise when strict liability is uniformly applied to an action as broad as that outlined in the instant case. As the law is here set forth every private nuisance which produces a physical effect on plaintiff's land will also constitute a trespass.

"T. Patrick Durkin"

"28. 342 P.2d at 797.

"29. 1 Harper & James, Torts § 1.24 (1956)."

CONCLUSION

The Petition for Writ of Certiorari to the Supreme Court of the State of Oregon is based upon a denial to petitioner of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. In their brief, respondents have failed to deal with the issue thus presented. In fact, respondents nowhere even mention this portion of the Constitution.

For the reasons suggested in its petition for Writ of Certiorari to the Supreme Court of the State of Oregon, and for the reasons set forth herein, petitioner respectfully prays that its Petition for Writ of Certiorari to the Supreme Court of the State of Oregon be granted.

Respectfully submitted,

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